

Other

**Ohio Valley Electric Company's Presentation for May 11, 2018 Preliminary Injunction
Hearing**

FirstEnergy Solutions Corp. v. F.E.R.C.
Preliminary Injunction Hearing

May 11, 2018

Agenda

- Overview Of OVEC And The ICPA's Filed Rate
- Rejection Of The ICPA Impacts The Filed Rate
- The Balance Of Harms and Public Interest Weigh Against A Preliminary Injunction

OVEC Overview

- Investor-owned utility, originally formed in 1952. See *Stipulation of Uncontested Facts* ¶¶ 11, 13.
- Operator of two power plants in Cheshire Ohio and Clifty Creek in Indiana. *Id.*
- 600 current employees, supporting an additional 650 retired employees and spouses through pensions and other benefits. *Id.*
- Sponsored by 13 companies pursuant to Inter-Company Power Agreement (“ICPA”). *Id.* ¶ 19.
- Current iteration of the ICPA was entered into on September 10, 2010, with term set to expire on June 30, 2040. *Id.* ¶ 15, Ex. DX-001.

FES Is Responsible For 4.85% Of OVEC Costs Through 2040

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

-----x
In re : Chapter 11
: FIRSTENERGY SOLUTIONS CORP., et al., : Case No. 18-50757
: (Jointly Administered)
Debtors.¹ : Hon. Judge Alan M. Kosciuszko
-----x
FIRSTENERGY SOLUTIONS CORP., and
FIRSTENERGY GENERATION, LLC :
Plaintiffs, : Adversary Proceeding No. 18-05021
: OFFICIAL COMMITTEE OF UNSECURED
CREDITORS, :
Plaintiff-Intervenor, :
v. :
FEDERAL ENERGY REGULATORY
COMMISSION, :
Defendant, :
OHIO VALLEY ELECTRIC CORP., and :
KRAYN WIND LLC, :
Defendant-Intervenors. :
-----x

STIPULATION OF UNCONTESTED FACTS

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: FE Aircraft Leasing Corp. (9245), case no. 18-50759; FirstEnergy Generation, LLC (0561), case no. 18-50762; FirstEnergy Generation Mansfield Unit 1 Corp. (5914), case no. 18-50763; FirstEnergy Nuclear Generation, LLC (6394), case no. 18-50760; FirstEnergy Nuclear Operating Company (1483), case no. 18-50761; FirstEnergy Solutions Corp. (0186), case no. 18-50757, and Norton Energy Storage L.L.C. (6928), case no. 18-50764. The Debtors' address is: 341 White Pond Dr., Akron, OH 44320.

1

114465325 v3

17. Through Assignment and Assumption Agreements executed on February 27, 2014, Defendants' Exhibit 3 and Exhibit 4, FES agreed to assume all liabilities and obligations—and was assigned all rights and interests—of certain preexisting ICPA Sponsoring Companies.

Sponsoring Company	% Share
Allegheny Energy Supply Company L.L.C.	3.01%
Appalachian Power Company	15.69%
Buckeye Power Generating, LLC	18.00%
The Dayton Power and Light Company	4.90%
Duke Energy Ohio, Inc.	9.00%
FirstEnergy Solutions Corp.	4.85%
Indiana Michigan Power Company	7.85%
Kentucky Utilities Company	2.50%
Louisville Gas and Electric Company	5.63%
Monongahela Power Company	0.49%
Ohio Power Company	19.93%
Peninsula Generation Cooperative	6.65%
Southern Indiana Gas and Electric Company	1.50%
Total:	100.00%

*Stipulation of Uncontested Facts, ¶¶ 17, 19;
see also D-3, D-4.*

ICPA Obligations Are Several And Not Joint

2/16/2018
EX-10.A.9 ex10a.htm INTER-COMPANY POWER AGREEMENT AMONG OVEC AND SPONSORING COMPANIES
Exhibit 10(a)

9.11. *Liability.* The rights and obligations of all the parties hereto shall be several and not joint or joint and several.

AMENDED AND RESTATED
INTER-COMPANY POWER AGREEMENT

DATED AS OF SEPTEMBER 10, 2010

AMONG

OHIO VALLEY ELECTRIC CORPORATION,
ALLEGHENY ENERGY SUPPLY COMPANY, L.L.C.
APPALACHIAN POWER COMPANY,
BUCKEYE POWER GENERATING, LLC,
COLUMBUS SOUTHERN POWER COMPANY,
THE DAYTON POWER AND LIGHT COMPANY,
DUKE ENERGY OHIO, INC.,
FIRSTENERGY GENERATION CORP.,
INDIANA MICHIGAN POWER COMPANY,
KENTUCKY UTILITIES COMPANY,
LOUISVILLE GAS AND ELECTRIC COMPANY,
MONONGAHELA POWER COMPANY,
OHIO POWER COMPANY,
PENINSULA GENERATION COOPERATIVE, and
SOUTHERN INDIANA GAS AND ELECTRIC COMPANY

<https://www.sec.gov/Archives/edgar/data/4904/000000490414000019/ex10a.htm>

1/30

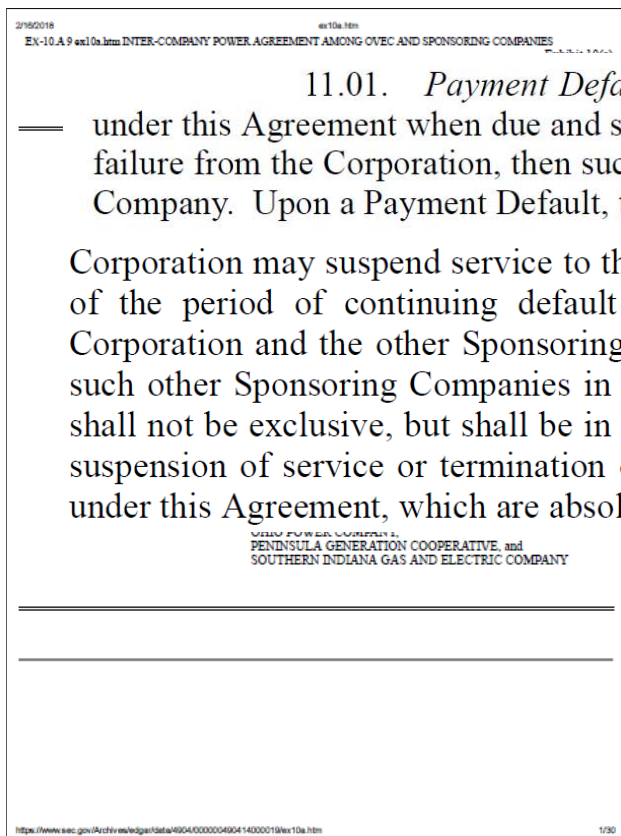
Ex. D-001 at 21

FES Is Responsible For Several Categories of Costs

- FES is responsible for fuel costs and 4.85% of Demand Charges, which include:
 - OVEC debt amortization (D-01 at § 5.03(a));
 - plant operating expenses (*id.* at § 5.03(b));
 - taxes (*id.* at § 5.03(c));
 - employee life and medical insurance, certain postretirement benefits (*id.* at § 5.03(e)); and
 - costs for decommissioning, shutting down, demolishing, and closing power plants at end of ICPA term and restoring facilities to condition necessary to satisfy regulatory requirements (*id.* at § 5.03(f)).

The ICPA Forbids FES Termination

- The ICPA expressly does not permit any Sponsoring Company to terminate its obligations under the agreement, providing only for the suspension of service even in the event of default.



Ex. D-001 at 24-25

The ICPA Applies The *Mobile-Sierra* Standard

2/16/2018
 EX-10.A.9 [ex10a.htm](#) INTER-COMPANY POWER AGREEMENT AMONG OVEC AND SPONSORING COMPANIES
 Exhibit 10(a)

9.09. *Modification of Agreement.* Absent the agreement of all parties to this Agreement, the standard for changes to provisions of this Agreement related to rates proposed by a party, a non-party or the Federal Energy Regulatory Commission (or a successor agency) acting sua sponte shall be the “public interest” standard of review set forth in *United Gas Pipeline Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) and *Federal Power Comm’n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

OHIO VALLEY ELECTRIC CORPORATION,
 ALLEGHENY ENERGY SUPPLY COMPANY, L.L.C.
 APPALACHIAN POWER COMPANY,
 BUCKEYE POWER GENERATING, LLC,
 COLUMBUS SOUTHERN POWER COMPANY,
 THE DAYTON POWER AND LIGHT COMPANY,
 DUKE ENERGY OHIO, INC.,
 FIRSTENERGY GENERATION CORP.,
 INDIANA MICHIGAN POWER COMPANY,
 KENTUCKY UTILITIES COMPANY,
 LOUISVILLE GAS AND ELECTRIC COMPANY,
 MONONGAHELA POWER COMPANY,
 OHIO POWER COMPANY,
 PENINSULA GENERATION COOPERATIVE, and
 SOUTHERN INDIANA GAS AND ELECTRIC COMPANY

<https://www.sec.gov/Archives/edgar/data/490410/000000490414000019/ex10a.htm>

1/30

Ex. D-001 at 18

FERC Accepted The ICPA As A Filed Rate

- OVEC filed the ICPA with FERC on March 23, 2011, which was accepted by letter order dated May 23, 2011. See Stipulation ¶ 23.

20110523-3028 FERC PDF (Unofficial) 05/23/2011

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

OFFICE OF ENERGY MARKET REGULATION

Pursuant to authority delegated to the Director, Division of Electric Power Regulation - Central, under 18 C.F.R. 375.307, and consistent with *Central Hudson*,² your submittal in Docket No. ER11-3441-000 is accepted for filing, effective May 23, 2011, as requested. Accordingly, the cancellation filing submitted in Docket No. ER11-3440-000 (cancelling the submittal in Docket No. ER11-3181-000) is hereby accepted, effective May 23, 2011.

On March 23, 2011, in Docket No. ER11-3181-000, you filed for cancellation of the Valley Electric Corporation (OVEC), revisions to (1) the Inter-Company Power Agreement among OVEC and the Sponsoring Companies¹ and (2) the Power Agreement between OVEC and its subsidiary, Indiana-Kentucky Electric Corporation (IKEC). On April 27, 2011, in Docket No. ER11-3440-000, you filed to cancel OVEC's March 23, 2011 filing due to its inadvertent use of an incorrect filing type in the eTariff system. Also on April 27, 2011, in Docket No. ER11-3441-000, you re-submitted the two OVEC agreements using the correct filing type. The agreements reflect the extension of the terms of the agreements from March 13, 2026 to June 30, 2040, and make various administrative updates.

¹ Sponsoring Companies consist of: Allegheny Energy Supply Company, LLC, Appalachian Power Company, Buckeye Power Generating, LLC, Columbus Southern Power Company, The Dayton Power and Light Company, Duke Energy Ohio, Inc., FirstEnergy Generation Corp., Indiana Michigan Power Company, Kentucky Utilities Company, Louisville Gas and Electric Company, Monongahela Power Company, Ohio Power Company, Peninsula Generation Cooperative, and Southern Indiana Gas and Electric Company.

Ex. D-002 at 2

Agenda

- Overview Of OVEC And The ICPA's Filed Rate
- Rejection Of The ICPA Impacts The Filed Rate
- The Balance Of Harms and Public Interest Weigh Against A Preliminary Injunction

Rejection of the ICPA Impacts The Filed Rate

<p style="text-align: center;">UNITED STATES BANKRUPTCY COURT NORTHERN DISTRICT OF OHIO EASTERN DIVISION</p> <hr style="border-top: 1px dashed black;"/> <p>In re FIRSTENERGY SOLUTIONS CORP., et al., Debtors.¹</p> <hr style="border-top: 1px dashed black;"/> <p>FIRSTENERGY SOLUTIONS CORP., and FIRSTENERGY GENERATION, LLC</p> <p style="text-align: center;">Plaintiffs,</p> <p>OFFICIAL COMMITTEE OF UNSECURED CREDITORS,</p> <p style="text-align: center;">Plaintiff-Intervenor,</p> <p style="text-align: center;">v.</p> <p>FEDERAL ENERGY REGULATORY COMMISSION,</p> <p style="text-align: center;">Defendant,</p> <p>OHIO VALLEY ELECTRIC CORP., and KRAYN WIND LLC,</p> <p style="text-align: center;">Defendant-Intervenors.</p> <hr style="border-top: 1px dashed black;"/> <p style="text-align: center;"><u>STIPULATION OF UNCONTESTED FACTS</u></p> <hr/> <p>¹ The Debtors in these chapter 11 cases, along with their federal tax identification number, are: FE Aircraft Leasing FirstEnergy Generation, LLC (0561), case no. 18-50762; FirstEnergy Nuclear Generating Company (5914), case no. 18-50763; FirstEnergy Nuclear Generating Company (50760); FirstEnergy Nuclear Operating Company (1483); FirstEnergy Solutions Corp. (0186), case no. 18-50757, and Norton Energy Services, LLC (0186), case no. 18-50764. The Debtors' address is: 341 White Pond Dr., Akron, OH 44316.</p> <p style="text-align: center;">1</p> <p>114465325 v3</p>	<p>34. OVEC further alleges that OVEC has further assessed potential outcomes that would result from FES's successful rejection of the ICPA. First, OVEC could attempt to renegotiate with all of the Sponsoring Companies and amend the ICPA to reallocate FES's share of the costs to the remaining Sponsoring Companies, altering each Sponsoring Companies' respective Power Participation Ratio. Second, assuming that no agreement can be reached, OVEC could attempt to cover FES's share of the costs by arranging for the raising of additional debt, the costs of which would ultimately be passed onto the Sponsoring Companies. Third, OVEC could attempt to reach specific agreement with a substitute Sponsoring Company to assume all or a portion of FES's obligations under the ICPA. FES asserts that the three potential outcomes described above are not the only potential outcomes that would result from FES's successful rejection of the ICPA.</p>
--	---

Stipulation of Uncontested Facts, ¶ 34


Rejection of the ICPA Impacts The Filed Rate

Overview of Transaction Alternatives

GUGGENHEIM

3 Address Budget Shortfall (in the event of a Sponsor default)

A	Pro Rata Sponsor Step Up <ul style="list-style-type: none"> Reallocate Shortfall across all non-defaulting Sponsors Sponsors may agree to increase participation by up to 15% - 25% (to address rating agency guidelines) 	FERC / State approval required for ICPA amendment; FERC approval required for any ICPA transfer
B	Sponsor Step In <ul style="list-style-type: none"> One or more existing investors assume Shortfall and equity ownership 	
C	Third Party (New Participant) <ul style="list-style-type: none"> Third party (not an existing Sponsor) assumes equity ownership 	



Ohio Valley Electric Corporation Indiana-Kentucky Electric Corporation

Strategic Planning Group Discussion Materials

February 2017

Plaintiffs' Exhibit E at 16.

Agenda

- Overview Of OVEC And The ICPA's Filed Rate
- Rejection Of The ICPA Impacts The Filed Rate
- The Balance Of Harms and Public Interest Weigh Against A Preliminary Injunction

The Irreparable Harm Standard

- The Debtors have not and cannot meet their heavy burden of establishing that “certain and immediate” irreparable harm will result if a preliminary injunction does not issue.
 - *Mich. Coal. of Radioactive Mat. Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).
- The Sixth Circuit takes into consideration three factors in performing a irreparable harm analysis: “(1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided.” *Id.* at 154.
- The harm alleged must occur ***in the limited time*** before the hearing on the permanent injunction.

Cooperative Sponsor Members Intervene In FERC Proceeding

- Two of the Sponsoring Companies, Wolverine and Buckeye, are non-profit cooperatives, who have moved to intervene before FERC and assert that their member owners will be exposed to increased costs.

20180416-5241 FERC PDF (Unofficial) 4/16/2018 3:56:59 PM

owners. Thus, unlike many of the other Sponsoring Companies, whose higher costs may (at least initially) be borne by their shareholders, the increased costs resulting from FirstEnergy's rejection of the contract will be borne directly by Wolverine's and Buckeye's distribution cooperative members, who themselves are owned by end-use consumers. In other words, every dollar avoided

subsidy, Indiana-Kentucky Electric Corporation (collectively, "OVEC"), in the above-captioned docket.³ Wolverine and Buckeye respectfully urge the Commission to grant OVEC's requested relief and find that FirstEnergy Solutions Corp.'s ("FirstEnergy") breach of the Inter-Company Power Agreement ("ICPA") is a violation of the filed rate doctrine and contrary to the public interest or, in the alternative, issue a declaratory order finding that the Commission has exclusive jurisdiction over the ICPA.³

¹ 18 C.F.R. §§ 385.212 and 385.214 (2017).

² *Ohio Valley Elec. Corp. v. First Energy Solutions Corp.*, Complaint or, in the Alternative, Request for Declaratory Order, Docket No. EL18-135-000 (filed March 26, 2018) ("OVEC Complaint").

³ Although on April 3, 2018, a Judge of the US Bankruptcy Court for the Northern District of Ohio granted a Temporary Restraining Order barring the Commission from attempting to force the debtors to continue performing under several power purchase agreements, including the ICPA, Wolverine and Buckeye understand that this issue

Ex. DJ-009 at 9

Third Parties Unaffiliated With FES Have Moved To Intervene

- Third parties without a financial interest in the Debtors' chapter 11 cases have moved to intervene in the FERC Proceeding, including the National Rural Electric Cooperative Association, comprised of more than 900 electricity cooperatives, whose member-owners are already being harmed by the ripple effects felt by FES's attempts to reject the ICPA.

20180416-5215 FERC PDF (Unofficial) 4/16/2018 4:36:45 PM

UNITED
FEDERAL ENERGY COMMISSION

Ohio Valley Electric Corporation

v.
First Energy Solutions Corp.

MOTION OF NATIONAL RURAL
ELECTRIC COOPERATIVE ASSOCIATION
TO INTERVENE IN SUPPORT OF
THE DEBTORS' REQUEST FOR
DECLARATORY ORDER

On March 26, 2018, the Ohio
Valley Electric Corporation
("OVEC"), filed a complaint against
First Energy Solutions Corporation
("FES") in the Federal Energy
Commission ("FERC") proceeding
and, for the reasons discussed
below, OVEC has requested that
the Commission grant its motion
for summary judgment.

MOTION
OVEC moves to intervene
in the FERC proceeding as a
party in interest. OVEC is a
service organization representing the
interests of rural electric utilities
owned, not-for-profit rural electric
utilities that provide electric service
to approximately 42 percent of the
nation's population. FES provides
percent of all electric energy (kilowatt-
hours) in the United States.

noted in its complaint that the very threat that FirstEnergy would seek to reject the ICPA in bankruptcy has already had an adverse effect on NRECA members—OVEC's credit ratings have declined and this, in turn has raised its borrowing costs. As NRECA members Buckeye and Wolverine have stated in their interventions (filed this date), these increases in borrowing costs are borne by OVEC's Sponsoring Companies, and particularly in the case of rural electric cooperatives whose customers are their owners, will be passed on in their entirety to consumers.

Ex. DJ-005 at 7

The Office Of The Ohio Consumers' Counsel Have Intervened

- The Office of the Ohio Consumers' Counsel, the authorized representative for approximately 4.5 million Ohio residential utility customers, has also moved to intervene in the FERC Proceeding, in which it asserts it has a direct and material interest.

electric utilities.² Letting FES off the hook for these costs, a risk FES voluntarily assumed, could result in shifting a significant portion of FES' share of hundreds of millions of dollars in current operating and capital costs, future decommissioning costs, and pension costs to other Ohio monopoly consumers. OCC, the agency with the

FEDER
Ohio Valley Electric Co
v.
FirstEnergy Solutions Co

THE OFF
Granting the com
protect Ohio's monopol
for OVEC's power plan

hundreds of millions of dollars in total for all affected states. In its March 26, 2018
complaint, OVEC asked the Federal Energy Regulatory Commission ("FERC") to find
that the then-anticipated intent of FirstEnergy Solutions ("FES") to declare bankruptcy
and seek rejection of the OVEC Inter-Company Power Agreement ("ICPA" or "OVEC
Agreement") would amount to a violation of the filed-rate doctrine and would be
inconsistent with the public interest.

The Office of the Ohio Consumers' Counsel ("OCC") has opposed making Ohio
electric consumers subsidize OVEC's power plants under the ICPA between OVEC, FES,
and other OVEC owners (or their utility-company affiliates). Consistent with OCC's
consumer protection position against power plant subsidies for OVEC, OCC supports
OVEC's Complaint. Granting the Complaint should stop an effort by FES to reject or

Ex. DJ-016 at 3